No. 11,168

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY, a corporation, *Appellant*

vs.

UNITED STATES OF AMERICA, *Appellee*

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT

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STATUTES

MISCELLANEOUS

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A) STATEMENT

1) *Jurisdictional facts*: This appeal relates to an action brought by appellant against appellee, seeking refund of internal-revenue taxes paid by appellant to Clifford C. Anglim and to Richard Nickell, who upon the dates of payment were the collector of internal-revenue and the acting collector of internal-revenue, respectively,

at San Francisco, but neither of whom was the collector of internal-revenue at San Francisco at the time this action was commenced. The taxes were collected by Anglim and Nickell through the agency of the San Francisco collector of customs, and the suit is based upon the Tucker Act of 1887, 28 USC 41 (20).

On July 20, 1945, the United States district judge granted defendant's (appellee's) motion to dismiss, the motion being based upon the contention that the complaint failed to state a cause of action and that the facts alleged in the complaint show affirmatively that said taxes were lawfully collected (R 19). Jurisdiction of this court to review the order of the district court is based upon 28 USC 225(1).

2) *Questions presented*: Following is a statement of the questions presented, and the statutes and trade agreements involved:

The internal-revenue taxes were paid on rum brought into the United States from the Virgin Islands during the years 1938 to 1941 (R 4). The formulae under which this rum was produced are set forth in the complaint (R 5-8). In brief, they show that it was first distilled at over 100 degrees proof, placed in charred oak barrels for aging, removed from the barrels for blending with other rum, or for the addition of small amounts of caramel or carbon (.7 percent caramel, or from 1 to 2.4 pounds of carbon per 100 gallons of rum), filtered, reduced in proof by addition of distilled water, bottled at a proof of 86 degrees, and shipped in that condition to the United States.

As to this rum, three basic contentions are made by appellant, as follows:

a) That a tax of 30 cents per proof gallon, applicable to *rectified* distilled spirits, should not have been collected (R 8).

b) That the "distilled spirits" tax of $2.25, $3 or $4 per gallon (the rate depending upon date of payment) should not have been assessed upon the basis of the wine gallon, but rather upon the basis of the proof gallon (R 9).

c) Alternatively, that said "distilled spirits" tax should have been assessed at the rate of $2 per wine gallon (R 9).

These contentions are based upon laws, trade agreements, and regulations, principally those set forth in the appendix hereto, as follows:

(a) Virgin Islands Act of March 3, 1917, section 3, 39 Stat. 1133, 48 USC 1394, relating to internal-revenue taxes upon Virgin Islands products.

(b) Revenue Act of 1918, section 1304, 40 Stat. 1142, 26 USC 3350 (a), relating to taxes upon Virgin Islands products.

(c) Revenue Act of 1918, section 605, 40 Stat. 1108 26 USC 2800 (a)(5), relating to rectified spirits.

(d) RS 3244 (3), 26 USC 3254 (g), relating to rectifiers of distilled spirits.

(e) RS 3248, 26 USC 2800 (e), relating to time of attachment of tax on distilled spirits.

(f) Trade Agreement Act of June 12, 1934, 48 Stat. 943, 19 USC 1351.

(g) Trade agreement between the United States and the United Kingdom, effective January 1, 1939, 54 Stat. 1897, TD 49753, articles XII and XIV.

(h) Trade agreement between the United States and Haiti, effective June 3, 1935, 49 Stat. 3737, TD 47667, article II.

(i) 26 C.F.R. 1941 supp. 180.134 (a), relating to internal-revenue tax on Virgin Islands products.

It is appellant's contention that the rectifying tax of 30 cents per proof gallon (26 USC 2800 (a)(5)) was inapplicable because (1) the rum had not been rectified or produced in such manner that the producer was a rectifier within the meaning of 26 USC 3254 (g); (2) that even had it been so produced the tax is inapplicable, because products of the Virgin Islands should be taxed upon arrival in the United States in the same manner as foreign products are taxed (48 USC 1394); namely, without assessment of the rectifying tax.

The first of these two contentions requires determination as to the scope of 26 USC 2800 (a)(5) and 26 USC 3254 (g), and the second requires determination of whether Virgin Islands products are taxable upon their arrival in the United States in accordance with the Virgin Islands Act of March 3, 1917, section 3, 39 Stat. 1133, 48 USC 1394, or in accordance with the Revenue Act of 1918, section 1304, 40 Stat. 1142, 26 USC 3350 (a). With regard to the first point, i.e., the scope of 26 USC 2800 (a)(5) and 26 USC 3254 (g), the question presented is whether the rum, as described in 26 USC 2800 (a)(5) was "rectified, purified, or refined in such manner," or was a mixture "produced in such manner," that the person "so rectifying, purifying, refining, or mixing the same *is a rectifier* within the meaning of section 3254 (g)," also, whether the definition of a rectifier in said section

3254 (g) extends to persons performing the described acts in the Virgin Islands rather than in the United States. Appellant contends that the merchandise was not rectified, etc., and that the producer was not a "rectifier" as thus defined.

The second contention as to the rectifying tax arises out of the fact that the Virgin Islands Act of 1917, 48 USC 1394, provides that products of those islands which come into the United States shall pay "the rates of duty and internal-revenue taxes which are required to be levied, collected, and paid upon like articles *imported from foreign* countries," whereas the Revenue Act of 1919, 26 USC 3350 (a), specifies that Virgin Islands products coming into the United States shall pay "a tax equal to the internal-revenue tax imposed in the United States upon like articles *of domestic manufacture.*" Consequently, as rectified foreign spirits are not assessed with the 30 cent tax when imported into the United States, this phase of the appeal requires determination of whether the act of 1917 or the act of 1919 controls.

A distinctly separate issue exists with regard to the internal-revenue tax as distinguished from the rectification tax, plaintiff's contentions being as follows:

a) If the taxable status of this rum is to be determined upon the basis of "like articles of domestic manufacture" as specified in 26 USC 3350 (a) supra, then the distilled spirits tax should have been based upon the proof gallon rather than the wine gallon. The rum was created at more than 100 proof, and domestic rum produced in this manner is taxed upon the proof gallon.

Alternatively, appellant seeks the same conclusion if the tax should be the same as that collected upon "like

articles imported from foreign countries'' as specified in the 1919 act. In 1939 the amount of internal-revenue tax on foreign rum was ''frozen'' by the trade agreement between the United States and the United Kingdom, cited above. Consequently the United States is prohibited by that trade agreement from charging a greater amount of internal-revenue tax upon foreign rum than that currently being imposed upon domestic rum; and as domestic rum is taxable upon the basis of the proof gallon, foreign rum should also be on that basis.

The remaining contention that the internal-revenue tax should not have been greater than $2 per wine gallon is based upon the fact that the trade agreement between the United States and Haiti cited above, which became effective June 3, 1935, enjoined the United States from assessing upon rum imported in containers holding less than one gallon an internal-revenue tax greater than the amount then being assessed, namely, $2 per gallon. Consequently, if the status of Virgin Islands products is to be determined upon the basis of the 1917 Virgin Islands Act, i.e., as being the same as that imposed upon ''like articles imported from foreign countries,'' then the taxes assessed here of $2.25, $3, or $4 per gallon were excessive to the extent they exceeded the rate of $2 in effect in 1935; namely $2 per gallon.

B) ARGUMENT

I) Rectification Tax Inapplicable to Virgin Islands Rum

1) *Statutes*: Pertinent statutes are set forth below, so far as material; and it may be noted that for revenue purposes, both customs and internal, the term ''United

States'' does not include the Virgin Islands (19 USC 1401 (k); 26 USC 3797 (a)(9)). Also at least as far back as acquisition of the Philippines in 1898, as well as Virgin Islands, Guam, and so on, it has been the uniform American legislative policy to keep these possessions outside the taxation system of the country, and for many purposes to give them the same status as foreign countries. For instance, merchandise from the Philippines and Virgin Islands, unless of insular origin, is dutiable at the same rates as though imported from a foreign country (19 USC 1301, 48 USC 1394); and each of these possessions has its own system of import and internal taxation (48 USC 1010, 1395-6). The variety of special legislation concerning these insular entities is revealed by title 48, United States Code.

Basic statutes are as follows:

a) Revenue Act of 1918, section 1304, 40 Stat. 1142, 26 USC 3350 (a):

> Sec. 1304. That there shall be levied, collected, and paid in the United States, upon articles coming into the United States from the Virgin Islands, a tax equal to the internal-revenue tax imposed in the United States *upon like articles of domestic manufacture; . . .*

b) Virgin Islands Act of March 3, 1917, section 3, 39 Stat. 1133, 48 USC 1394:

> Sec. 3. That on and after the passage of this act there shall be levied, collected, and paid upon all articles coming into the United States or its possessions, from the West Indian Islands ceded to the United States by Denmark, the rates of duty and internal-revenue taxes which are required to be

levied, collected, and paid *upon like articles imported from foreign countries;* . . .

c) Same act, section 5, 48 USC 1396:

Sec. 5. That the duties *and* taxes *collected in pursuance of this act* shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands under such rules and regulations as the President may prescribe.

It should be explained that the 30-cent rectification tax is exacted upon the "articles of *domestic* manufacture" mentioned in section 1304 supra, but that under a uniform Treasury practice it has not been collected upon "articles imported from *foreign* countries" (sec. 3 supra), which are subjected merely to the basic rate provided for distilled spirits generally, being $2.25 per gallon under 26 USC 2800 (a)(1), though since raised to $9. The assessment of rectifying tax in the instant case is made on the theory that Virgin Islands spirits are subject to above-quoted provision for "articles of *domestic* manufacture."

In the court below appellee contended that these two provisions "are clearly in conflict and inconsistent" in regard to Virgin Islands rum, and that the 1918 act, "being the later, is therefore controlling." However, appellant's position is that the statutes do not conflict in regard to the rectification tax. This argument is supported by rules of statutory construction, by evidence of intent intrinsic and obvious in the Virgin Islands law, and by established administrative practice and presumed legislative adoption of that practice.

2) *Rules of construction:* The two sections relate to the same subject and therefore should be considered together, under the familiar rule for statutes in pari materia, and should be so construed as to permit both to stand together and remain in effect so far as circumstances permit.

The following decisions by the Supreme Court are among many that might be cited to this subject:

a) *US v. Dotterweich,* 320 US 277, 280: Regard for legislative purposes "should infuse construction."

b) *Wilmot v. Mudge,* 103 US 217, 221: Here it is said:

> The rules of construing statutes in like cases with the present are so well understood as to need no citation of authorities. They are: First, that effect shall be given to all the words of a statute, where this is possible without a conflict; and, second, that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. If both can stand by any reasonable construction, that construction must be adopted.

Here there are no "express terms of repeal," nor is "the implication of repeal . . . a necessary one." Also, it is not "impossible for both provisions under consideration to stand," because the later one does not "necessarily" destroy the earlier one, and "both can stand by . . . reasonable construction." The construction urged below by appellee would destroy the pertinent portion

of the Virgin Islands Act, whereas appellant's construction would give full effect to that act while only slightly narrowing the effect of the 1918 revenue act.

c) *Southland Gasoline Co. v. Bailey,* 319 US 44, 47: As to another instance of statutes of different periods, the Supreme Court said:

> The problem of statutory construction . . . should not be solved simply by a literal reading of the exemption section of the Fair Labor Standards Act and the delegation of power section of the Motor Carriers Act. Both sections are parts of important general statutes and their particular language should be construed in the light of the purposes which led to the enactment of the entire legislation. United States v. American Trucking Association, 310 US 534, 542. . . .

It will be demonstrated below that the dominating purpose of the statutes here in question is ascertainable from the Islands act.

d) *Securities & Exchange Comm. v. Joiner Leasing Co.*, 319 US 344, 350: This decision refers to:

> . . . the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits, so as to carry out in particular cases the generally expressed legislative policy.

The instant case is especially within the rule, because as noted infra the legislative policy is expressed specially by the Islands act, and context of the Islands act (sec. 5) requires continued operation of section 3.

e) *Interstate Commerce Comm. v. Railway L. Ex. Asso.,* 315 US 373, 380: An administrative construction was discredited because "hostile to the major objective of the act." In the instant case, as will be shown hereinafter, the present administrative construction, here in question, which is based upon the concept of revenue to the American Treasury, is hostile to the dominating concept of revenue to the insular government.

The present pertinency of the foregoing enunciations of principle by the Supreme Court will now be made in detail.

3) *Purpose of Virgin Islands Act:* In the instant case the "light of the purposes which led to the enactment of the entire legislation" is especially clear. The measure is entitled "an act to provide a temporary government for the West Indian Islands acquired by the United States from Denmark" (39 Stat. 1132). The life blood of any government is its revenue, and, in this instance, the framework and mode of operation of the insular government having been established by sections 1 and 2, the raising and disposal of revenues were governed by sections 3-5, relating (a) to exactions made in this country on merchandise from Virgin Islands, and (b) to export duties and other taxes collected by the insular government, and (c) allocating all these revenues to the benefit of that government, by directing that "the duties and taxes collected in pursuance of *this act* shall not be covered into the general fund of the Treasury of the United States, but shall be used and expended for the government and benefit of said islands." This provision concerning collections under "this act," to wit, the original insular act of 1917, has never been revised or superseded. Therefore section 5

contemplates now, as it did originally, so far as internal taxes are concerned, only those levied "upon like articles imported from foreign countries."

The only revenue available to the insular government is that "collected in pursuance of *this*" original Virgin Islands Act. No other collections under American excise laws are assigned to that government; so that if section 3, a revenue-producing provision in the Virgin Island Act, should be regarded as superseded by later legislation, it would be necessary to distort the words in section 5 of the original statute, "collected under *this* act," so they would read, "collected under *any* act." Such judicial surgery should be resorted to only where unavoidably necessary; and it is here unnecessary, either to meet some exigency such as failure of insular revenues, or to comply with rules of statutory construction.

This obvious perversion of explicit legislative language can be avoided by construing the Virgin Islands Act, 48 USC 1394, and the later one, 26 USC 3350 (a), as having the same meaning despite the slight verbal difference. Such a construction would be reasonable because in accord with the manifest policy of the fundamental legislation governing fiscal relations between this country and the Islands.

It would also be reasonable because (a) of the incongruity and difficulty of applying processing taxes to merchandise produced outside the United States, because (b) of the incidental reversal of long-continued administrative practice in regard to Virgin Islands spirits, because (c) of present administrative usage concerning other phases of the rectification laws, and because (d) of pre-

sumed legislative approval of the practical Treasury construction of Virgin Islands statutes and of rectification statutes. These subjects will be dealt with under our headings 4-6 infra.

4) *Rectification tax applicable only to American products:* The Revenue Act of 1918, 26 USC 3350 (a), which provides for Island products "the internal revenue tax imposed in the United States upon like articles of domestic manufacture," may well be construed as referring only to the general tax on distilled spirits, and not to the rectification tax. If so, there is then no conflict between the two statutes, and plaintiff's contention that Island products are not subject to rectification tax should be sustained, and that phase of this suit thus disposed of.

The rectification tax is a special impost of a domestic type that is not suitable to extraterritorial administration and has only recently been applied by revenue officials to insular production and is still not considered applicable to spirits from foreign countries. In regard to these inconsistent official positions it will be helpful to consider the history of rectification statutes.

Apparently the first legislation on the subject was by Act of July 20, 1868, 15 Stat. 130, 150, which imposed so-called special taxes on many occupations in this country, ranging from brewing to peddling, and with some subsequent amendments was carried into RS 3244. The pertinent part of that section réads thus:

> Sec. 3244. Special taxes are imposed as follows:
>
> Third. Rectifiers of distilled spirits shall pay $200. Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort,

> or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor-dealer who has in his possession any still or leach-tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any materials, manufacture any spurious, imitation, or compound liquors for sale, under the name whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying: . . .

By no stretch of language could this provision be regarded as relating to anything but domestic operations. Occupational activities outside the United States are in no way implicated.

This special tax on domestic rectifiers of spirits has continued until the present time, being now found without substantial statutory change in 26 USC 3250 (f) (1) and 3254 (g), in part vii on "occupational taxes" on liquor.

The present tax on rectification differs from abovementioned tax on rectifiers in that, instead of being occupational, it is a processing tax. It seems to have originated in Act of October 3, 1917, section 304, 40 Stat. 310, which as now found in 26 USC 2800 (a) (5) reads thus, so far as here pertinent:

> (5) *Rectified Spirits and Wines.*—In addition to the tax imposed by this chapter on distilled spirits and wines, there shall be levied, assessed, collected, and paid, a tax of 30 cents on each proof gallon . . .

on all distilled spirits or wines rectified, purified, or refined in such manner, and on all mixtures produced in such manner, that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3254 (g): . . .

This reference to section 3254 (g), in which the language of RS 3244 (3), supra, is embodied, implicates the same exclusive purview of domestic products that was connoted by the latter.

This construction is strengthened by various other statutes, to wit:

a) 19 USC 2801 (b), relating to proof and volume of rectified spirits and providing:

> When the process of rectification is completed and the taxes prescribed by section 2800 (a) (5) have been paid, it shall be unlawful for the rectifier or other dealer to reduce in proof or increase in volume such spirits or wine by the addition of water or other substance; nothing herein contained shall, however, prevent a rectifier from using again in the process of rectification spirits already rectified and upon which the taxes have theretofore been paid.

Comment: These provisions can relate only to processes subsequent to payment of tax in this country. On insular or foreign processing the tax would not have "been paid" or even accrued prior to arrival in the United States.

b) 19 USC 2801 (c)(1), on "exemption from tax," provides that:

> . . . blended whiskies and blended fruit brandies shall be exempt from tax under section 2800 (a)(5) only when compounded under the immediate supervision of a revenue officer, in such tanks and under such

conditions and supervision as the Commissioner, with the approval of the Secretary, may prescribe.

Comment: This "immediate supervision of a revenue officer" could occur only in regard to domestic rectification, and regulations for "tanks and . . . conditions" could be enforced by the Commissioner only for domestic operations.

c) 26 USC 2801(e)(1)(2) authorize Treasury regulations. prescribe arrangement of premises, and impose penalties for misuse of premises. Same comment; also penalties would not be imposed for acts occurring outside the United States.

d) 26 USC 2801 (f), imposes penalties in connection with rectification violations. Same comment.

(e) 26 USC, part ii, on "distilling and rectifying," contains many other provisions of like implication, such as section 2812, on "notice of business of distiller or rectifier"; section 2813, on "notice of intention to rectify"; section 2828, on furnishing of ladders and other facilities to revenue officials for examination of rectification premises; sections 2831-3, on equipment, search of premises, and use of signs; sections 2855-7, on monthly returns of rectifier, unlawful rectifying, and records of rectifiers; sections 2860-2, on limited purchases by rectifiers, gauging, branding and stamping by government official, and form of stamping, and section 2865, on penalties for noncompliance with rectification statutes.

These numerous statutes in pari materia unanimously support appellant's contention that rectification taxes relate only to domestic production, the same as the special tax of $200 on rectifiers is payable only by American

processors. It would be hard to find another case of statutory intent based on so many clear implications.

5) *Regulations:* There seem to be no published Treasury directives in relation to rectification taxes on foreign liquors in general. Therefore, in that regard the evidence that the tax has not been imposed is negative. However, for 28 years, as is well known in official and commercial circles, the tax has not been assessed.

As to Virgin Islands products the evidence is well documented, and in that regard appellant cites infra the published customs regulations of 1943, 1937, 1931, and 1923, all of which recognize the Virgin Islands Act of March 3, 1917, as applicable, and ignore 26 USC 3350 (a).

Customs regulations are pertinent because goods going to or coming from those islands, as with commerce with foreign countries, are subject to the usual customs requirements, and can be cleared through customs, whether inward or outward, only upon compliance with taxing statutes including collection of duties and internal taxes upon arrival, and the drawback of duties and taxes upon export. These regulations are more specifically as follows:

a) Customs Regulations 1943, section 7.9 on "Virgin Islands": While these regulations prescribe customs formalities for commerce between the United States and the Islands, of special value here is the fact that the basic statute cited is 48 USC 1394 (section 3 of the original Virgin Islands Act of March 3, 1917). It is quoted in full in the regulations, including this language:

> There shall be levied, collected, and paid upon all articles coming into the United States or its possessions from the Virgin Islands the rates of duty and *internal-revenue taxes* which are required to be levied,

collected, and paid upon like articles imported from *foreign countries:* . . .

b) Customs Regulations 1937: Article 272 is similar to section 7.9 in the regulations of 1943 supra, and embodies the same statutory quotation from 48 USC 1394.

c) Customs Regulations 1931: Article 267 likewise includes the Virgin Island provision in full.

d) Customs Regulations 1923: Article 245 cites "Act Mar. 3, 1917, sec. 3," and, while the statute is not quoted, also cites Treasury Decision 37089 of April 3, 1917, which, for "information and guidance" of "collectors of customs," publishes the act in full, containing the involved provision concerning internal-revenue taxes upon like articles imported from foreign countries.

Thus, in administering the law relating to merchandise coming into the country from Virgin Islands, both for customs and for internal-revenue purposes (26 CFR 180.5), the American customs service was for many years acting under published Treasury instructions which even now recognize section 3 of the Virgin Islands act as operative and give no weight whatever to the theory that the provision in that act for "like articles imported from foreign countries" was altered in meaning by the words in the Revenue Act of 1918, "like articles of domestic manufacture."

However, the Treasury has not been entirely consistent. This appears from an internal-revenue regulation published on October 25, 1937 as TD 4770, which is now embodied in 26 Code Fed. Reg. 180, and relates to "collection of internal-revenue tax on intoxicating liquors . . . coming into the United States from . . . the Virgin Islands."

This regulation entirely ignored section 3 of the Virgin Island act but referred to section 1304 of the revenue act of 1918, now 26 USC 3350 (a). After mentioning that distilled spirits from the Islands "are subject to the rates imposed upon domestic products of the same kind by the internal-revenue laws," the regulation added (26 CFR 180.1):

> . . . Rectification tax on rectified distilled spirits or wines at the rate of 30 cents per proof gallon is also collectible . . . if the product so rectified would be subject to that tax if manufactured in the United States.

In *Interstate Comm. Comn. v. Railway L. Ex. Assn.*, 315 US 373, 380, the earlier one of conflicting interpretations by the commission was adopted, though other reasons were also given for the conclusion reached.

So it appears that the Treasury was consistent until October 1937, but that since then customs regulations have recognized section 3 of the Virgin Islands Act, while internal-revenue regulations have disregarded it! Under such circumstances the rule concerning the weight to be imputed to long-continued administrative construction is hardly weakened by the head-on collision between two Treasury bureaus which in 1937 created an impasse that still persists, especially in view of the fact that the Treasury attitude that imposes rectification taxes on Island spirits is inconsistent with the continued administrative exemption of foreign products from those taxes.

Further, in the court below appellee conceded that "the rectifying tax was not collected on distilled spirits brought in from the Virgin Islands prior to the promulgation of

T.D. 4770," in October 1937, thus confirming above statements as to uniform practice during the previous 20 years.

Pertinent to the long administrative usage which was interrupted in 1937, is the fact that in June 1926 the Attorney General, 35 Opns. 63, reviewed the internal tax laws concerning distilled spirits with possible reference to Virgin Islands, including both the fundamental statute of March 3, 1917, containing the words "like articles imported from foreign countries," and the revenue provision containing the words "like articles of domestic manufacture," and his extensive discussion contains no suggestion of conflict between those phrases, and no suggestion that the rectification tax applied to Island products.

6) *Effect of long-continued administrative construction:* In April, 1917, Treasury Decision 37089 published in full for official guidance the Act of March 3, 1917, 39 Stat. 1132, imposing upon Island products the internal-revenue taxes which were payable "upon like articles imported from foreign countries." The Revenue Act of 1918, section 1304, 40 Stat. 1142, 26 USC 3350 (a), provided on Island products a "tax equal to the internal-revenue tax imposed in the United States upon like articles of *domestic* manufacture."

As noted above, in 1923, 1931, 1937, and 1943, the Treasury promulgated general regulations which cited the earlier act as pertinent to shipments from the Islands; that is, there was no recognition of a possible difference between internal taxes upon "articles imported from foreign countries" and "articles of domestic manufacture." Since 1917 there have been about a dozen comprehensive revisions of internal-revenue laws and several re-

visions of customs laws, together with a number of enactments relating specially to the Islands, though on other subjects. See 48 USC 1391-406.

Congress is presumed to have been aware of these Treasury promulgations during a 20-year period and of the fact that during all that time the rectification tax had not been applied to Island products. If this long and uniform practice had been regarded as erroneous, corrective legislation would doubtless have occurred; but there has been none.

An administrative practice which existed undisturbed from 1917 to 1937 and concerning which the regulations have been conflicting since 1937 should now be followed. As said in *Border Line Transp. Co. v. Haas* (CCA 9), 128 F.2d 192, syllabus 1:

> Departmental construction of statute for nearly half a century was entitled to great weight and would not be upset except for the most cogent reasons.

In *US v. Jackson,* 280 US 183, are found two pronouncements that are here pertinent: In syllabus 5, 74 L.ed. 361:

> The silence of Congress in the face of a long-continued practice of an executive department involving the construction of a federal statute must be considered as equivalent to consent to continue the practice.

In syllabus 4, ib.:

> Great weight is properly to be given to the construction consistently given to a statute by the executive department charged with its administration; and such construction is not to be overturned unless clearly wrong, or unless a different construction is plainly required.

Note, also, *US v. Alabama G. S. R. Co.,* 142 US 615, 621, saying:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.

Further, as said in *Merritt v. Welsh,* 104 US 694, 704 (emphasis added):

> . . . If experience shows that Congress acted under a mistaken impression, that does not authorize the Treasury Department or the courts to take the part of legislative guardians and, by construction, to make new laws which they imagine Congress would have made had it been properly informed, *but which Congress itself, on being properly informed, has not, as yet, seen fit to make.* . . .

Other pertinent citations are these:

Hahn v. US, 107 US 402, 405;
US v. Hill, 120 US 169, 182;
US v. Cerecedo, 209 US 337, 339;
US v. American Trading Assn., 310 US 534, 543.

In view of these various decisions, little weight should be given to the fact that TD 4770, October 1937, contained instructions in violation of an established practice based on reiterated promulgations.

II) The Rum Was Not Rectified

Appellant's cause of action does not necessarily depend upon whether the Virgin Islands Act of 1917 applies to exclusion of the Revenue Act of 1918. If the Virgin Islands Act is paramount, then the 30 cent tax was improperly assessed *whether or not* the rum was rectified. And if the Revenue Act of 1918 is paramount then the question of fact arises as to whether this rum was rectified.

This tax is levied under the provisions of 26 USC 2800 (a)(5) and 26 USC 3254 (g) set forth in the appendix hereto. It is not levied upon any enumerated articles but upon distilled spirits "rectified, purified or refined *in such manner* and on all mixtures produced *in such manner,* that the person so rectifying, purifying, refining or mixing the same is a rectifier within the meaning of section 3254 (g)" (26 USC 2800 (a)(5)). In other words, mixtures of spirits are taxable at the 30-cent rate only if the person "mixing the same" is a person described in section 3254 (g).

The persons described in section 3254 (g) are those who perform several distinct operations, to wit: a) rectifying, purifying, or refining distilled spirits, and (b) mixing spirits "with any material." However, the section is explicit in stating that by the mixing referred to the person *must* "manufacture" either "spurious," "imitation," or "compound liquors," for sale.

Two of the processes enumerated in this statute (purifying and refining) obviously did not occur here, because the addition of caramel (formula 7), the blending with other rum (formulas 2 and 10), or the treatment with darco carbon (formulas 11 and 12) did not constitute purification or refining. Also, these processes did not constitute rectifying, for as stated in *Wampole v. US,* 191 F 573, 576:

> . . . rectification of distilled spirits, in a legal sense, means the process . . . by which the spirits are *separated* from the substance with which it is mixed or combined.

Therefore the only possible question is whether, by virtue of the mixing and blending referred to above, "spurious, imitation or compound liquors" were *manufactured.* Upon this point it may be first observed that the recited formulas do not *per se* establish that spurious, imitation or compound liquors were manufactured by the processes referred to. Therefore defendant's motion below, insofar as it relates to this court, should have been denied. However, it may also be observed that appellant intended to establish by evidence that this rum was not a spurious liquor or an imitation liquor, and that the mixing, as alleged in the complaint, did not result in the "manufacture" of compound liquor. Consequently, it is submitted that in the absence of such evidence the court below was unable to determine whether appellant's complaint stated a cause of action.

In the court below, defendant referred to *US v. Quantity of Distilled Spirits,* Fed. Cas. 11494, and *Michel v. Nunn,* 101 F 423, as authorities for the statement that

"there certainly can be no doubt that the rum . . . was rectified." These decisions, however, do not support this contention. Federal Case 11494 related to a penalty imposed against a rectifier for failure to make a proper record of the receipt of distilled spirits as required by statute, *the only issue being whether such records had been made.* However, the court also quoted the statute defining rectifiers, now found in 26 USC 3254 (g), and stated that it was not disputed that the defendants were rectifiers (p. 108). Therefore the decision is not pertinent to the question of whether the instant merchandise was rectified.

Although the second case cited by defendant below, *Michel v. Nunn,* involved the question whether rectification had occurred, it is submitted that the court's conclusion therein is not binding here, because (a) it is contrary to subsequent departmental practice interpreting the statute; (b) the facts in that case do not disclose whether a spurious, imitation, or compound liquor was manufactured; and (c) the result of such mixing as there occurred is not comparable with the result in the instant case. Factually the *Michel* case involved a retail liquor dealer who, as shown by the opinion, mixed whisky, sugar, and water, or reduced the proof of whisky by the addition of water and added coloring matter (blackberry juice) to the diluted whisky. As to these facts the court held that the dealer was a rectifier because he mixed liquor "with any material." But error in the court's conclusion is indicated by the fact that the statute was interpreted to include *all mixing of any material,* regardless of whether by such mixing a

spurious, imitation, or compound liquor was manufactured.

Also, the court stated that there would not be any doubt that under the statutes in question the Commissioner of Internal Revenue could require a person mixing "*either* water or sugar" with spirits to pay tax as a rectifier. However, appellant represents to this court that for the last 75 years the statute has been administratively interpreted so as to exclude the mixing of water and spirits from its scope. Also, under current internal-revenue regulations (26 Code of Fed. Reg. 184.245) it is permissible, after distillation has been completed, to mix burnt sugar or caramel with brandy without incurring the rectification tax. Therefore it is submitted that the cited decision is not authoritative.

Further, on the question of whether this mixing or blending "manufactured" a compound liquor, as required by the statute, the decision in *Anheuser-Busch v. US,* 207 US 556, is pertinent. Therein it was said (p. 562):

> Manufacture implies a change, but every change is not a manufacture, and yet every change in an article is the result of treatment, labor, and manipulation . . . something more is necessary, . . . There must be a transformation; a new and different article must emerge having a distinctive name, character, or use

Therefore, it was appellant's purpose in the District Court to show by competent evidence that the rum in question did not acquire, by virtue of the processes set forth in the formulas, a "distinctive name, character, or use."

III) The Rum Was Not Produced by a Rectifier

Independent of the above points is also a question of law as to whether a Virgin Islands product which has in fact been produced by a process of rectification, purification, etc., is subject to rectification tax under 26 USC 2800(a)(5). Appellant asserts that such merchandise would not be so taxable, because the statute relates to products which are produced "in such manner, that the person so rectifying . . . is a rectifier within the meaning of section 3254 (g)." Consequently, as producers of spirits within the Virgin Islands Act are not considered to be "rectifiers" within the meaning of 3254 (g), the spirits produced or processed by such persons are not taxable at the 30-cent rate.

IV) The Distilled-Spirits Tax Was Collectible Upon the Proof-Gallon Basis

Regardless of whether the Virgin Islands Act or the Revenue Act of 1918 be relied upon, appellant contends that the distilled-spirits tax should have been assessed upon the basis of the proof gallon.

Pertinent effects flowing from application of either act are as follows:

1) *Virgin Islands Act:* If this act be applicable, all products coming into the United States from the Virgin Islands are subject to "the rates of duty and internal-revenue taxes which are required to be levied . . . upon like articles imported from foreign countries."

The British Trade Agreement of 1939 (TD 49753, 54 Stat. 1897) relates to "rum in containers holding each one gallon or less" (schedule IV, paragraph 802), and

by article XII it is provided that merchandise specified in schedule IV shall, upon importation into the United States, be exempt from:

> . . . duties, taxes, fees . . . imposed in connection with importations *in excess* of those imposed on the day of the signature of this agreement . . .

However, by article XIV it is stated that the provisions of said article XII:

> shall not prevent the imposition at any time on the importation of any article of a *charge equivalent to* an internal-revenue tax imposed in respect of a like domestic article . . .

In 1939, when this trade agreement was entered into, the rate of tax upon domestic and foreign rum was $2.25 per gallon. As to British rum the amount of this tax was thus "frozen" by aforesaid article XII and by virtue of the generalization clause in the Trade Agreement Act of June 12, 1934, 48 Stat. 943, 19 USC 1351 (set forth in the appendix) the benefit thus given to the United Kingdom applied "to articles the growth, produce, or manufacture of *all* foreign countries, whether imported directly or indirectly." However, by article XIV of said trade agreement, the United States reserved the right to collect upon foreign rum "*a charge equivalent to*" the internal-revenue tax imposed upon a *like* domestic article.

When the rate of tax was subsequently raised by Congress to $3 and $4 per gallon, and when, as here, it was applied to the wine gallon, the immediate result was that the *amount* of tax thus collected exceeded the *amount* of

tax collected upon "a like domestic article," because all domestic distilled spirits are originally distilled at more than 100 proof and therefore taxes upon the proof gallon basis rather than the wine gallon basis.

Therefore, the instant distilled-spirits tax of $3 and $4 per *wine* gallon would be excessive if the merchandise had been imported from England or other non-discriminating foreign countries. Consequently under the Virgin Islands Act of 1917, such taxes, being measured by the tax required to be levied "upon like articles from foreign countries," were likewise excessive.

In regard to the effect of the British Trade Agreement defendant below argued that:

> Trade agreements with foreign countries have no application to possessions of the United States (De Lima v. Bidwell, 182 US 1).

This is correct. However, appellant does not seek to apply the trade agreement to the Virgin Islands but merely relies upon the agreement as establishing the taxable status for foreign rum. Therefore, as Virgin Islands rum is taxable (as provided by the 1917 act) at:

> the rates of . . . internal revenue taxes which are required to be levied . . . upon like articles imported from foreign countries

then the rate of tax upon "like articles imported from foreign countries" must be found. Consequently the trade agreement is pertinent.

2) *The 1918 Revenue Act:* With regard to the distilled-spirits tax upon Virgin Islands products, when based upon the Revenue Act of 1918, the same result is obtained, i.e., taxation should be upon the proof-gallon

basis. The 1918 act (now 26 USC 3350) required such products to pay:

> A tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.

All domestic distilled spirits, such as rum, are distilled at not less than 160 proof and are taxed accordingly, i.e., upon the proof gallon. Consequently the instant rum, having been distilled at more than 100 proof (paragraph II of complaint) is taxable upon the proof-gallon basis, the same as "like articles of domestic manufacture" are taxed.

In addition pertinent Treasury regulations specify that the internal tax upon Virgin Islands products shall be assessed upon the proof-gallon basis "regardless of the proof of the spirits at the time of their entry into the United States," provided the insular gauger's certification shows "that the spirits covered thereby were 100 degrees or more in proof at the time they were withdrawn from the *insular* bonded warehouse." See 26 CFR, 1941 supp., 180.134 (a) set forth in the appendix.

Consequently, as the Treasury Department has determined that underproof Virgin Islands spirits are taxable upon the proof-gallon basis where the original spirits were withdrawn from insular bonded warehouse at proof or over, the real question here is whether compliance with such regulation, i.e., the furnishing of an insular gauge certificate, is a condition precedent to recovery of taxes wrongfully assessed.

This question is readily answered by the fact that the regulation in question (26 CFR, 1941 supp., 180.134 (a))

was not promulgated until June 16, 1941, whereas some of the instant merchandise arrived in the United States prior to that date.

Also, as to the merchandise which arrived after June 16, 1941, it is well settled that regulations prescribed under the general supervisory authority of the Secretary of the Treasury and relating to a method of proving a tax status or to prevent fraud are not exclusive and that proof according to rules of evidence is permissible. A decision by Judge Sawyer of this circuit is closely in point: *Pascal v. Sullivan,* 21 F 496, a customs case in which it was contended that imported merchandise was free of duty as "natural mineral waters." A Treasury regulation had prescribed a certain form of certificate as to the character of the water, and it was argued that the Secretary had legally refused to receive any other evidence. This contention was overruled, the court saying (p. 500):

> While the regulation may, perhaps, be a proper one (I am not prepared to hold that it is not) for the convenient administration of the customs laws by the collectors of ports, it would be in my judgment wholly unreasonable to make it conclusive upon the rights of the parties when they appeal to the courts of the country to recover the excess of duties in fact exacted and paid; and, in my judgment, no authority is vested in the secretary to give the regulation such effect. To give it such effect would be to change the law of the land as to the competency of evidence, and the statutes prescribing the rate of duties that shall be collected. If the law of the land, in this instance, can be thus changed by an arbitrary rule of the secretary of the

> treasury, I do not perceive why it might not in like manner be changed in any other particular relating to the administration of the treasury department.

Other pertinent decisions on this point are *US v. Goodsell* (CCA 2), 91 F 519; *Siegfried v. Phelps,* 40 F 660, also by Judge Sawyer; *Anglo-California Bank v. Secretary* (CCA 9), 76 F 742, 749-50, and *Campbell v. US,* 107 US 407, 410.

V) The Distilled-Spirits Rate Should Not Exceed $2 Per Gallon

For reasons stated above it is contended that the tax is to be measured by the rate applicable to "like articles imported from foreign countries" (Virgin Islands Act of 1917).

Rum of the character here involved (in containers holding one gallon or less) is enumerated in schedule II of the Haitian Trade Agreement of March 28, 1935, 49 Stat. 3737, TD 47667, and as to such merchandise the trade agreement provides (article II):

> Articles, the growth, produce or manufacture of the Republic of Haiti, enumerated and described in schedule II . . . shall, on their importation into the United States of America, be exempt from all ordinary customs duties in excess of those set forth in said Schedule, *and from all other duties, taxes,* fees, charges, or *exactions,* imposed on or in connection with importations, *in excess of those imposed* or required to be imposed by laws of the United States of America in effect *on the day of the signature of this Agreement.*

and in view of the generalization clause of the Trade Agreement Act of June 12, 1934, 48 Stat. 943, 19 USC

1351 (set forth in the appendix) the benefit thus given to Haiti applied "to articles the growth, produce, or manufacture of *all* foreign countries, whether imported directly or indirectly."

On the day of signature of that agreement the "distilled spirits" tax applicable to imported rum was $2 per gallon, under Revenue Act of 1918, section 600, as amended by Liquor Taxing Act of 1934, 26 USC 1934 ed., 1150 (a). It is here contended that statutes enacted subsequently to the Haitian agreement, which raised the tax upon "distilled spirits" to $2.25, to $3 and $4 per gallon (sec. 710, Revenue Act of 1938; sec. 213, Revenue Act of 1940; and sec. 533, Revenue Act of 1941), should be construed as not revoking the trade agreement, but should be applied to all distilled spirits except those enumerated in the agreement.

The principle of law supporting this contention is so well known as not to require citation, it being that treaties and acts of Congress are of equal force; that if possible courts must construe each so as to give effect to both, and that the earlier will not be deemed to have been abrogated by the latter unless such conclusion is absolutely essential or unless the purpose of Congress to repeal one by the other is clearly expressed.

With this rule as a basis it may be seen that the treaty with Haiti "froze" the rate of internal-revenue tax on rum when packed in specified containers at $2 per gallon. Also, in later acts, Congress by use of general language, "distilled spirits," changed the $2 rate to $2.25, then to $3 and then to $4 per gallon. Consequently, as the provisions of the Haitian agreement were, by virtue of the gen-

eralization provision of the Trade Agreement Act of June 12, 1934, 48 Stat. 943, 19 USC 1351, extended to all foreign countries, the correct rate upon "like articles imported from foreign countries" (Virgin Islands Act of 1917) is still $2 per gallon. Therefore the instant distilled spirits tax should have been that amount.

The court will find that in *United States v. Rathjen,* 31 CCPA (Customs) 70, 177 F2d 103, it was held that a clause in the Cuban Trade Agreement of 1934, similar to above-quoted article II of the Haitian Agreement, did not have the effect of "freezing" the rate of internal-revenue tax on rum and that the Revenue Act of 1938, being of later date, served to repeal said Cuban treaty or trade agreement.

However, that decision is not controlling here, because:

1) The Revenue Act of 1938 also amended the law relating to the import tax on lumber, but the act provided (sec. 704) that the amendment should not be effective if "in conflict with any international obligation of the United States."

2) Because of this provision the Court of Customs and Patent Appeals said:

> From the above-quoted language it is plain to us that the Congress in enacting the said revenue act had clearly in mind the international obligations of the United States such as the one here involved, and if it had intended that merchandise from Cuba such as in the instant case was to be excepted from the scope of that act it would have so stated as it did with respect to the tax on lumber.

This consideration is not present with regard to the revenue acts of 1940 and 1941. Therefore the *Rathjen* case

is not an adverse precedent to plaintiff's contention, and consequently if the court concludes that Virgin Islands rum is taxable at the rate applicable to "like articles imported from foreign countries," it must also determine whether the revenue acts of 1938, 1940, and 1941 were in conflict with and repealed article II of the Haitian Trade Agreement.

Upon this point and in regard to *US v. Rathjen* supra, the following is pertinent: Present counsel for appellant were also counsel for the appellee in that case and therefore know that the argument which follows was not presented to the Court of Customs and Patent Appeals in that appeal. Consequently the *Rathjen* case is not *stare decisis.*

1) *No conflict created by statute of 1938:* By section 710, Revenue Act of 1938 (c. 289, 52 Stat. 572), Congress enacted the following provision:

> Sec. 710. Tax on Distilled Spirits.
>
> (a) Section 600 (a)(4) of the Revenue Act of 1918, as amended, is amended to read as follows:
>
> "(4) on and after January 12, 1934, and until July 1, 1938, $2.00, and on or after July 1, 1938, $2.25, on each proof or wine gallon when below proof and a proportionate tax at the like rate or all fractional parts of such proof or wine gallon."

This legislation was amendatory of the Revenue Act of 1918 as amended, to the extent (1) of changing the rate of tax therein provided, and (2) of specifying periods of time during which the new rate applied. Therefore it is here claimed to be an act of Congress not in conflict with the trade agreement of 1935 because by this amendment Congress did not, *in 1938,* as held in the *Rathjen* case,

enact a "statute providing that *all distilled spirits imported into the United States* should be subject to an internal-revenue tax of $2.25 per proof gallon" (italics quoted).

By section 600 (a), Revenue Act of 1918, Congress had provided that "all distilled spirits . . . that may be . . . hereafter imported into the United States" should be taxed at $2.20 per gallon. By the Revenue Act of 1926 (sec. 900) this language was reenacted in the form of an amendment, but with different rates specified. On January 11, 1934 (Liquor Taxing Act of 1934), section 600 of the Revenue Act of 1918 as amended was again amended, but only to the extent of changing the rate of tax. Then by article II of the Haitian agreement the rate in effect *at that time* was "frozen."

Therefore, section 710 of the Revenue Act of 1938, by which Congress merely changed the *rate* of tax, should not be construed as being an enactment *in 1938* of the provision found in section 600, Revenue Act of 1918, namely, that *all* imported distilled spirits were taxable at the new rate of $2.25 per gallon.

On the contrary, the act of 1938 should be construed to accord with the terms of the prior agreement, with the result that after the effective date of said act all imported distilled spirits, *except* those covered by the Haitian agreement, were subject to the new rate. This accords with the principle of statutory construction referred to in the following:

a) *Commonwealth v. Howes*, 270 Mass. 69, considered an amendment granting to municipal authorities the power to prohibit the taking of fish. The original statute author-

ized these authorities to "control and regulate" such taking, and the amended statute added to this phrase the words "or prohibit." As to the amendment it was said (p. 72):

> . . . When adopted, the legislative amendment became a part of the original statute to the same extent as to everyone as if always contained therein unless the amendment involves the abrogation of contractual relations between the State and others. Fitzgerald v. Lewis, 164 Mass. 495, 499; Wheelwright v. Tax Commissioner, 235 Mass. 584, 585.

b) *Allison v. Hatton,* 46 Or. 370, relates to the tax status of certain land in Oregon which by an act of 1885 had been incorporated within the boundaries of Columbia county. In 1898 an act amending an independent act of 1895 established boundaries for Washington county, including therein a strip of land which was then a part of Columbia county. In 1901 an act amending the original act of 1885 changed the boundaries of Columbia county so as to include land not theretofore in any county. In addition, this act of 1901 reenacted the act of 1885 (as it then appeared in section 2251, Hill's Ann. Laws of 1887) by stating that section 2251 "is hereby amended to read as follows," and then setting forth the section in full as originally enacted, without reference to the act of 1898 which had given to Washington county a portion of the land originally included in Columbia county. As to these facts the court said (p. 372):

> . . . The act of 1901, amending section 2251, so far as the question here involved is concerned, is not a new legislative declaration on the subject of boundaries of the county, but merely a restatement or re-

publication of the law as it existed prior to the act of 1898, *and therefore not in conflict with the latter act, and does not repeal by implication.* The rule is that where a section of the statute is amended so as to read "as follows," and the section is then set forth with the changes intended to be made, those portions of the old section that are merely copied into the amendment without change are not to be considered as reenacted or as a new statement of the law, but are to be read as a part of the earlier statute, if in conflict with another law passed after the section amended and before the amendatory act, unless there is a clear manifestation of legislative intention to the contrary. In the absence of such intention, it is the change or additions incorporated in the section amended only that are to be considered enacted. This doctrine has been several times applied by this court, and is supported by authorities. Endlich, Interp. Stat., sec. 194; Stingle v. Nevel, 9 Or. 62; Eddy v. Kincaid, 28 Or. 537 (41 Pac. 156, 159); Small v. Lutz, 41 Or. 570 (67 Pac. 421, 69 Pac. 824).

c) *Endlich on Interpretation of Statutes,* thus referred to by the Oregon court, states (sec. 194):

> It has been held that where a statute merely reenacts the provision of an earlier one, it is to be read as part of the original statute, and not of the reenacting one, if in conflict with another passed after the first, but before the last act; and therefore does not repeal by implication the intermediate one.

d) *Stingle v. Nevel,* 9 Or. 62: Here, upon somewhat the same subject, it was said with respect to a reenacted statute which appeared to conflict with an intermediate one (p. 64):

In Ely v. Horton, 15 N.Y. 597, it was held that where a section of a statute "is amended to read as follows," and the section is then set forth with the changes to be made, those portions of the old section that are merely copied without change, are not to be considered as repealed and reenacted, but such portions remain in force from the first enactment. It is the changes, or additions, incorporated into the section amended that are enacted. S. P. Moore v. Mansert, 49 N.Y. 332; People v. Supervisors, 67 N.Y. 109; Burwell v. Tullis, 12 Minn. 486; Alexander v. State, 9 Ind. 339.

The court then held that the republication of the Oregon statute was "not a re-enactment."

e) *City of St. Louis v. Alexander,* 23 Mo. 483: And here it was held (p. 509):

> . . . Now the effect of the revision of the charter, on the 3d of March, 1851, was, not to make former provisions, which had previously existed, and were continued, to begin from that date, but for convenience sake to embody all the acts in relation to the charter into one law, leaving the acts in force at the time of the revision to take date from the period when they were first passed. It would be of the most mischievous consequence to hold that the revision of a law had the effect of making the revised law entirely original, to be construed as though none of its provisions had effect but from the date of the revised law. When a former provision is included in a revised law, it is only thereby intended to continue its existence, not to make it operate as an original act to take effect from the date of the revised law. The revision has not the effect of breaking the continuity of those provisions which were in force before it was made.

f) See, also, *City of Cape Girardeau v. Riley,* 52 Mo. 424, stating (p. 429):

> . . . The revision of a law does not have the effect of making the revised law entirely original, so as to be construed as though none of its provisions had effect but from the date of the revised law.
>
> When a former provision is continued in a revised law, it operates only as a continuance of its existence, and not as an original act. (St. Louis v. Alexander, 23 Mo. 509.)

g) Upon this subject it is said in Sutherland's Statutory Construction, 3d ed., sec. 1933:

> Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. . . . The provisions of the original act or section reenacted by the amendment are held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect. Thus, rights and liabilities accrued under provisions of the original act which are reenacted are not affected by the amendment.

h) *US v. La Franca,* 282 US 568: Here the court had before it the direct question of whether section 701, Revenue Act of 1924, reenacting certain provisions of the Revenue Act of 1918, should be considered to be a statute "in force when the National Prohibition Act (of 1919) was enacted." As to this it was said (pp. 571-2):

> This section was passed in lieu of a similar provision in the Revenue Act of 1918, repeated by the Revenue Act of 1921. The government, accordingly,

treats the item sought to be recovered under section 701 as having been imposed by an act in force prior to the National Prohibition Act. With that view we agree.

i) *People v. New York C. & St. L. R. Co.*, 316 Ill. 452: The legislature by an act of 1917 had modified an act of 1901 by excluding the taxes of certain districts from the provisions of said act of 1901. In 1919, 1921, and 1923 the original act of 1901 was reenacted in connection with the adoption of certain amendments thereto, but no reference was made to the act of 1917. Upon these facts the court said in respect to the question of whether the laws of 1919, 1921, and 1923 were in conflict with and operated as a repeal of the 1917 statutes (pp. 457-8):

> . . . Moreover, when the General Assembly amends a statute and no change is made in parts of it, the repeated portions, either literally or substantially, are regarded as a continuation of the existing law and not as the enactment of a new law upon the subject. People v. Lloyd, 307 Ill. 23; Svenson v. Hanson, 289 Ill. 242. The amendments to section 2 of the act approved May 9, 1901, made in 1919, 1921 and 1923, were not enactments of new laws upon the subject of the levy and extension of taxes, but constituted merely the continuation of the existing law with the respective amendments added, modified by section 17 of the act approved May 17, 1917, as amended. There is no repugnancy between the two.

In most of the cited cases the legislative bodies, when amending the prior statutes, repeated their provisions and added the desired changes. Yet the courts held that such repetition was not a reenactment of the original statutes

as of the date of amendment, but, as so appropriately stated in *People v. New York* supra, "merely the continuation of the existing law with the respective amendments added, *modified* by section 17 of the act approved May 17, 1917, as amended."

In the present case Congress in 1938 did not restate the terms of the Revenue Act of 1918 as amended, but merely (1) amended that portion which had specified the rate of tax, and (2) specified the effective date of the new tax. Therefore, The Revenue Act of 1938 was not an enactment *in 1938* that "*all* distilled spirits . . . that may be hereafter . . . imported into the United States" should be taxed at $2.25 per gallon.

In presenting this last point due regard has been given to the fact that when laws are amended the amended act is usually construed, as to subsequent occurrences, as if it had been originally enacted in the amended form. *US v. La Franca,* 282 US 568, 571-2; *Blair v. Chicago,* 201 US 400, 475; *Pennsylvania Co. v. US,* 236 US 351, 362. But, as is shown by the above authorities, this rule does not apply in cases such as the present, particularly when by an intervening act or event rights have been created which would be violated if the amendment were considered as an enactment of the original statute upon the date of amendment.

For reasons stated above appellant contends that the Revenue Act of 1938 and the Haitian agreement of 1935 are not irreconcilable and that Article II of the agreement was not repealed by the statute.

2) *Effect of enactment of the Internal-Revenue Code of 1939,* c. 2, 53 Stat. 1:

By section 4 of said act "all general laws of the United States and parts of such laws, relating exclusively to internal revenue, in force on the 2nd day of January 1939," were repealed and there was reenacted without change as section 2800 (a)(4), supra, the then existing statute relating to taxes on imported distilled spirits.

This section, being merely a reenactment of an existing statute, did not supersede the prior trade agreement, for there is no evidence of such an intention by Congress. The situation therefore resembles that passed upon in *Bill v. US*, 27 C.C.P.A. (Customs) 26, 104 F(2d) 67, involving (1) a treaty with Germany dated in 1925, and (2) paragraph 371 of the Tariff Act of 1930 as to which it was said:

> At the time of the enactment of the 1930 tariff act the German treaty was the only one of its type which had been ratified and embodied in the statutes at large, *and we find no history connected with the passage of the tariff act which indicates any intention on the part of Congress to abrogate or supersede that treaty.*

Another pertinent decision upon this point is *Cook v. US*, 288 US 102, relating to a treaty dated in 1924 and to the tariff acts of 1922 and 1930. In this case it was specifically contended by petitioner that "Congress did not intend to alter the status and effect of the Treaty of 1924 *when it reenacted, in 1930, sections 581 and 584 of the Tariff Act of 1922*, and the treaty amounts to a limitation on these sections," and as to this the court said:

> (P. 107:). The main question for decision is whether sec. 581 of the Tariff Act of 1930 . . . is modified, as applied to British vessels suspected of being en-

gaged in smuggling liquors into the United States, by the Treaty between this country and Great Britain proclaimed May 22, 1924. *That section—which is a reenactment in identical language of section 581 of the Tariff Act of 1922 . . . declares . . .*

* * * * *

(P. 118:) Second, The Treaty being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by section 581 upon officers of the Coast Guard . . .

* * * * *

(P. 119:) *Third, The Treaty was not abrogated by reenacting section 581 of the Tariff Act of 1930 in the identical terms of the Act of 1922.* A Treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. Chew Heong v. United States, 112 US 536; United States v. Payne, 264 US 446. Here the contrary appears. The committee reports and the debates upon the Act of 1930, like the reenacted section itself, make no mention of the Treaty of 1924.

Also, in accordance with the decisions referred to above pertaining to the effect of the Revenue Act of 1938, the Internal Revenue Code of 1939, being merely a reenactment of existing statutes, should not be considered as being new legislation in conflict with rights created by the intervening trade agreement. Therefore it should be held that this act did not affect the preferential status of foreign rum secured by the Haitian agreement of 1935.

3) *Effect of the Revenue Act of 1940,* C. 419, 54 Stat. 524, *and the Revenue Act of 1941,* C. 412, 55 Stat. 708:

Pertinent portions of these acts read as follows:

Revenue Act of 1940:

SEC. 213. DISTILLED SPIRITS.

(a) Section 2800 of the Internal Revenue Code is amended by inserting at the end thereof the following new subsections:

"(g) DEFENSE TAX FOR FIVE YEARS.—In lieu of the rates of tax specified in such of the sections of this title as are set forth in the following table, the rates applicable with respect to the period after June 30, 1940, and before July 1, 1945, shall be the rates set forth under the heading 'Defense-Tax Rate':

"Section	Description of Tax	Old rate	Defense-tax rate
2800(a)(1)	Distilled spirits generally	$2.25	$3."

Revenue Act of 1941:

SEC. 533. DISTILLED SPIRITS.

(a) Rate on Distilled Spirits.—Section 2800 (a)(1) of the Internal Revenue Code is amended by striking out "at the rate of $2.25 (and on brandy at the rate of $2)" and by inserting in lieu thereof "at the rate of $4", and by striking out "(except brandy)."

Because each of these laws merely amends the law in effect upon the date of the Haitian agreement with regard to the *rate* of tax, neither should be construed as repealing the agreement by implication. See argument above with respect to the Revenue Act of 1938.

Therefore the issue to be decided is whether acts of Congress are to be construed as nullifying a prior trade agreement when no evidence exists as to such an inten-

tion. If it is found that the trade agreement guarantee of a rate of tax equal to $2 per gallon is still in effect, then Virgin Islands rum is taxable at that rate under the Virgin Islands Act of 1917.

VI) Conclusion

It is respectfully submitted that the court below erred in dismissing appellant's complaint and the judgment appealed from should be reversed and the cause remanded.

San Francisco, January 25, 1946.

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(APPENDIX FOLLOWS)

Appendix

(a) Virgin Islands Act of March 3, 1917, section 3, 39 Stat. 1133, 48 USC 1394, relating to internal-revenue taxes upon Virgin Islands products:

SEC. 1394. Customs duties and internal-revenue taxes.

There shall be levied, collected, and paid upon all articles coming into the United States or its possessions from the Virgin Islands *the rates of* duty and *internal-revenue taxes which are required to be levied, collected, and paid upon like articles imported from foreign countries:* Provided, That all articles, the growth or product of, or manufactured in, such islands, from materials the growth or product of such islands or of the United States, or of both, or which do not contain foreign materials to the value of more than 20 per centum of their total value, upon which no drawback of customs duties has been allowed therein, coming into the United States from such islands shall be admitted free of duty. (Mar. 3, 1917, ch. 171, sec. 3, 39 Stat. 1133.)

(b) Revenue Act of 1918, section 1304, 40 Stat. 1142, 26 USC 3350 (a), relating to taxes upon Virgin Islands products:

SEC. 3350. Shipments to the United States—(a) Taxes imposed in the United States.

Except as provided in section 3123, there shall be levied, collected, and paid in the United States, upon articles coming into the United States from the Virgin Islands, *a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture.*

(b) Exemption from tax imposed in the Virgin Islands.

Such articles shipped from such islands to the United States shall be exempt from the payment of any tax imposed by the internal revenue laws of such islands. (53 Stat. 404.)

(c) Revenue Act of 1918, section 605, 40 Stat. 1108, 26 USC 2800 (a)(5), relating to rectified spirits:

(5) Rectified spirits and wines.

In addition to the tax imposed by this chapter on distilled spirits and wines, there shall be levied, assessed, collected, and paid, a tax of 30 cents on each proof gallon and a proportionate tax at a like rate on all fractional parts of such proof gallon on all distilled spirits or wines rectified, purified, or refined in such manner, and on all mixtures produced in such manner, that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3254 (g): Provided, That this tax shall not apply to gin produced by the redistillation of a pure spirit over juniper berries and other aromatics.

(d) RS 3244 (3), 26 USC 3254 (g), relating to rectifiers of distilled spirits:

(g) Rectifier.

Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who,

without rectifying, purifying, or refining distilled spirits, shall, by mixing such spirits, wine, or other liquor with any material, manufacture any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying: Provided, That nothing in this subsection or section 3250 (f)(1) shall be held to prohibit the purifying or refining of spirits in the course of original and continuous distillation through any material which will not remain incorporated with such spirits when the manufacture thereof is complete.

(e) RS 3248, 26 USC 2800 (c), relating to time of attachment of tax on distilled spirits:

(c) Time of attachment.

The tax shall attach to distilled spirits, spirits, alcohol or alcoholic spirit, within the meaning of subsection (b) of section 2809 as soon as this substance is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

(f) Trade Agreement Act of June 12, 1934, 48 Stat. 943, 19 USC 1351:

Sec. 1351. Foreign-trade agreements—(a) Authority of President; modification of duties; altering import restrictions.

(a) For the purpose of expanding foreign markets for the products of the United States . . . the President, whenever he finds as a fact that any

existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time—

(1) To enter into foreign-trade agreements with foreign governments or intrumentalities thereof; and

(2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign-trade agreements, as are required or appropriate to carry out any foreign-trade agreement that the President has entered into hereunder. No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists. The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly, or indirectly: . . .

(g) Trade agreement between the United States and the United Kingdom, effective January 1, 1939, 54 Stat. 1897, TD 49753, articles XII and XIV:

ARTICLE XII

Articles the growth, produce or manufacture of any of the territories to which this Agreement applies on the part of his Majesty the King, enumerated and described in Schedule IV annexed to this Agreement, shall, on their importation into the

United States of America, from whatever place arriving, be exempt from ordinary customs duties other or higher than those set forth and provided for in the said Schedule IV, subject to the conditions therein set out. The said articles shall also be exempt from all other duties, taxes, fees, charges or exactions of any kind, imposed on or in connection with importation, in excess of those imposed on the day of the signature of this Agreement or required to be imposed thereafter under laws of the United States of America in force on the day of the signature of this Agreement.

ARTICLE XIV

The provisions of Article IX, Article X, Article XI and Article XII of this Agreement shall not prevent the imposition at any time on the importation of any article of a charge equivalent to an internal tax imposed in respect of a like domestic article or in respect of a commodity from which the imported article has been produced or manufactured in whole or in part.

(h) Trade agreement between the United States and Haiti, effective June 3, 1935, 49 Stat. 3737, TD 47667, article II:

ARTICLE II

Articles the growth, produce or manufacture of the Republic of Haiti, enumerated and described in Schedule II annexed to this Agreement and made a part thereof, shall, on their importation into the United States of America, be exempt from ordinary customs duties in excess of those set forth in the said Schedule, and from all other duties, taxes, fees, charges, or exactions, imposed on or in connection with importation, in excess of those imposed or re-

quired to be imposed by laws of the United States of America in effect on the day of the signature of this Agreement.

(i) 26 C.F.R. 1941 supp. 180.134 (a), relating to internal-revenue tax on Virgin Islands products:

(a) Distilled spirits. If the certificate is accompanied by a report of gauge made by an insular gauger and bears the insular gauger's certification, as prescribed in Sec. 180.99, showing that the spirits covered thereby were 100 degrees or more in proof at the time of withdrawal from the insular bonded warehouse, the internal revenue tax at the distilled spirits rate will be collected on the proof-gallon contents of the packages, or cases, regardless of the proof of the spirits at the time of their entry into the United States. If the certification of the insular gauger and the accompanying report of gauge show that the spirits were less than 100 degrees in proof at the time of withdrawal thereof from the insular bonded warehouse, the internal revenue tax at the distilled spirits rate will be collected on the wine-gallon contents of the packages or cases as determined by the customs gauger.